THOMAS TOSDAL, STATE BAR NO. 067834
ANGELA JAE, STATE BAR NO. 248571
TOSDAL, SMITH, STEINER & WAX
401 West A Street, Suite 320
San Diego, CA 92101-7911
Telephone: (619) 239-7200
Fax: (619) 239-6048

Attorneys for Plaintiff
DEENA DEARDURFF SCHMIDT

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

DEENA DEARDURFF SCHMIDT, Plaintiff, v. BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, SAN DIEGO STATE UNIVERSITY, JEFF SCHEMMEL, DOES 1-15, Defendants.	CASE NO. 07-CV-2343DMS(WMC) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S *EX PARTE* APPLICATION FOR ORDER COMPELLING DEFENDANTS TO PRODUCE UNREDACTED COPIES OF ALL DOCUMENTS CONTAINED IN INITIAL DISCLOSURES**

1. INTRODUCTION

Plaintiff applies to this Court *ex parte* for an order compelling Defendants to disclose unredacted copies of all documents produced with their initial disclosures. Good cause exists for this *ex parte* application because: (1) Plaintiff has a right to the unredacted documents under FRCP 26(a); (2) Family Educational Rights and Privacy Act ("FERPA") does not apply to the documents because they are not "education records"; (3) even if FERPA applied, the author of the documents fall within FERPA's "directory information" exemption; and (4) FERPA includes a judicial order exception to their confidentiality requirements.

Should the Court refuse to issue this order *ex parte*, Plaintiff will be prejudiced because neither she nor her counsel will have knowledge of the authors of the documents which allegedly contain complaints against Schmidt in time for the settlement conference scheduled for April 21, 2008. If Plaintiff is required to seek an order in accordance with the regular noticed motion procedures, she will not be able to properly prepare for her participation in the early neutral evaluation settlement conference without the unredacted documents.

2. FACTS

This case is about Defendants Board of Trustees of the California State University, San Diego State University, and Jeff Schemmel discriminating and retaliating against Plaintiff Deena Deardurff Schmidt in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq., which forbids sex discrimination in any education program or activity receiving federal financial assistance, and of California's anti-discrimination in employment laws, Govt. Code §12940 et seq.

In August 2007 Defendants terminated Schmidt's employment as the head coach of San Diego State University's women's swimming and diving teams after 13 years of service and only three months after the construction of a new SDSU on-campus pool facility, which was constructed in large part by the efforts of Schmidt and from student fees obtained by the student referendum on which Schmidt worked so hard. Prior to her termination, Schmidt advocated to Defendants, and their agents and employees, for gender equity in athletics and against sex discrimination in athletics. At the time of her termination, Schmidt was battling cancer, of which Schemmel

TOSDAL, SMITH, STEINER & WAX
401 West A Street, Suite 320
San Diego, CA 92101-7911
Telephone: (619) 239-7200
Facsimile: (619) 239-6048

was advised.

This action was filed in the San Diego Superior Court and removed by Defendants to District Court. On February 25, 2008, both parties timely exchanged witnesses, documents and other information pursuant to the FRCP 26(a) initial disclosure requirements. A review of Defendants' initial disclosures revealed that certain documents produced, specifically communications from students and parents, contained redactions. The substance of the documents was not redacted but Defendants redacted the names of the persons who authored the documents.

Plaintiff's counsel subsequently met and conferred with counsel for Defendants by telephone requesting they produce un-redacted copies of certain documents produced in Defendants' initial disclosures. By letter dated March 10, 2008, Defendants' counsel indicated that they would provide "unredacted copies of those documents as soon as the University has complied with its FERPA obligations."

By letter dated March 25, 2008, Plaintiff's counsel again requested they produce "unredacted copies of all documents contained in the initial disclosures in advance of the settlement conference" and that if no agreement could be reached, the issue would be raised with Magistrate Judge William McCurine.

The issue of the redacted copies of documents produced by Defendants in their initial disclosures was raised with Magistrate Judge McCurine by Plaintiff's counsel during the April 4, 2008, conference call. Counsel for Defendants indicated that FERPA's confidentiality requirements, a federal privacy law protecting the disclosure of educational records, may apply to the documents which

TOSDAL, SMITH, STEINER & WAX
401 West A Street, Suite 320
San Diego, CA 92101-7911
Telephone: (619) 239-7200
Facsimile: (619) 239-6048

would require either parental/student consent or a court order before they produced the unredacted documents. Plaintiff's counsel indicated that he would seek an order from the Court *ex parte* compelling the disclosure of the unredacted documents so that Plaintiff will be fully prepared for her participation in the settlement conference scheduled to be held on April 21, 2008.

Counsel for Defendants indicated that he would not oppose the *ex parte* application.

3. GOOD CAUSE EXISTS FOR PLAINTIFF'S *EX PARTE* APPLICATION FOR AN ORDER COMPELLING DEFENDANTS TO DISCLOSE UNREDACTED COPIES OF THE DOCUMENTS PRODUCED IN THEIR INITIAL DISCLOSURES

Federal Rules of Civil Procedure Rule 26(a) requires each party to disclose to the other party certain information related to witnesses, documents, damages and insurance without awaiting a discovery request. Each party must provide copies or a description by category and location of all documents in its "possession, custody, or control" that it "may use to support" its claims or defenses. Fed. R. Civ. Proc. Rule 26(a)(1)(A)(ii). Withholding such documents, unless privileged, may result in their exclusion at trial. Adv. Comm. Notes on 1993 Amendments to FRCP 26(a).

Certain documents Defendants produced with their initial documents have been redacted. Although the substance of the documents is not redacted, the authors of the communications have been redacted. Defendants assert that the documents are redacted because FERPA may apply and they have not yet complied with their obligations under FERPA, which requires Defendants to first obtain parental/student consent prior to disclosing certain information contained in "educational records." 20 U.S.C. §1232g.

////

TOSDAL, SMITH, STEINER & WAX
401 West A Street, Suite 320
San Diego, CA 92101-7911
Telephone: (619) 239-7200
Facsimile: (619) 239-6048

1. FERPA Does Not Apply To The Documents

FERPA conditions the receipt of federal funding by educational institutions on their compliance with procedures that allow access to records by students and parents while restricting access by other parties without student consent. Id.; Owasso Independent School District v. Falvo, 534 U.S. 426, 428-249 (2002). FERPA prohibits educational agencies from disclosing an individual's "educational records" or "personally identifiable information contained therein other than directory information," without the consent of that individual's parents. 20 U.S.C. §1232g(b)(1); 34 C.F.R. 99. But FERPA expressly exempts "directory information" from its confidentiality requirements. 20 U.S.C. §1232g(b)(1).

"Education records" is defined to include "those records, files, documents, and other material which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232g(a)(4)(A); U.S. v. Miami University, 294 F.3d 797, 812 (6th Cir. 2002). "Personally identifiable information" is narrowly defined by the Act's regulations to include "only the student's name, parent's name, the student's or parent's address, social security number, or other information that would make the student's identify easily traceable." 34 C.F.R. §99.3.

The redacted communications Defendants produced with their initial disclosures are not "education records" for purposes of FERPA. The term "education records" does not include "in the case of persons who are *employed* by an educational agency or institution but who are not in attendance at such agency or institution,

TOSDAL, SMITH, STEINER & WAX
401 West A Street, Suite 320
San Diego, CA 92101-7911
Telephone: (619) 239-7200
Facsimile: (619) 239-6048

records made and maintained in the normal course of business *which relate exclusively to such person in that person's capacity as an employee* and are not available for use for any other purpose." 20 U.S.C. §1232g(a)(4)(B)(iii), emphasis added.

The documents redacted by Defendants relate *exclusively* to Schmidt in her capacity as the women's swimming and diving coach for which she was employed by San Diego State University ("SDSU"). Therefore, the authors of the communications, who are either SDSU students or parents of students, must be disclosed because the communications are not "education records" as defined by FERPA.

2. Even If FERPA Applied To The Documents, The Authors of the Communications Are Expressly Exempt From FERPA's Confidentiality Requirements

Should the Court find that FERPA applied, student names are expressly exempt from the FERPA confidentiality requirements as "directory information." 20 U.S.C. §1232g(a)(5)(A). FERPA specifically exempts from its confidentiality requirements "the student's name, address, telephone listing, date and place of birth, major field of study, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." Id. Parental information, with the exception of their financial records, is also exempt from FERPA. C.M. v. Board of Educ. Of Union County Regional High School Dist., 128 Fed.Appx. 876, 883-884 (3rd Cir. 2005). The authors of the redacted communications are either SDSU students or parents of SDSU students. Accordingly, Defendants must produce unredacted documents to include the authors of the communications so that Plaintiff will be on equal footing with Defendants in time for the settlement conference.

TOSDAL, SMITH, STEINER & WAX
401 West A Street, Suite 320
San Diego, CA 92101-7911
Telephone: (619) 239-7200
Facsimile: (619) 239-6048

FERPA excludes from its requirement of parental/student consent compliance with judicial orders and subpoenas. 20 U.S.C. §1232g(b)(2)(B). Should the Court issue an order compelling Defendants to disclose unredacted copies of the documents, Defendants must disclose information after providing notice to (but does not need to obtain consent of) the parents and students of such orders in advance of their compliance. 20 U.S.C. §1232g(b)(2).

4. CONCLUSION

Plaintiff requests the Court grant this *ex parte* application for an order compelling Defendants to disclose unredacted copies of the documents produced with their initial disclosures by April 16, 2008, before the settlement conference set for April 21, 2008.

Dated: April 7, 2008

TOSDAL SMITH STEINER & WAX

s/Angela Jae
ANGELA JAE
ajae@tosdalsmith.com
Attorneys for Plaintiff

TOSDAL, SMITH, STEINER & WAX
401 West A Street, Suite 320
San Diego, CA 92101-7911
Telephone: (619) 239-7200
Facsimile: (619) 239-6048